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# Mistakes Lawyers Make in Discovery

by William W Schwarzer

Like childbearing and hang gliding, discovery is something a person is expected to know when the time comes. Law schools do not teach it. Continuing education courses barely touch it. While the profession wrings its collective hands over discovery abuse, no one is doing much about teaching the fundamentals.

Discovery is also like golf and tennis: A person's natural instincts often lead in the wrong direction. It is much easier to do discovery wrong than right, and, once learned, bad habits are hard to unlearn. Like the Bourbon kings, many lawyers doing discovery have learned nothing and forgotten nothing.

Perhaps the analogy to golf and tennis can be pushed a bit further. Success in discovery, as in those sports, turns on two things: concentration and economy. Failure to keep your eye on the ball is fatal. Inability to coordinate your body—or your discovery efforts—to avoid waste and distraction can be devastating.

For many lawyers, discovery is a Pavlovian reaction. When a lawsuit is filed, and the filing stamp comes down, the word processor begins to grind out interrogatories and requests for production. Deposition notices drop like autumn leaves.

Of course, some discovery may have to be taken immediately. You may need to commit an opponent to his testimony; a witness may soon be unavailable; a critical document may need to be obtained. But it is wrong to start discovery without having thought it through and determined its aims.

Thinking that discovery is inherently good or is an end in itself is a mistake. Often you can get much of what you need more conveniently and less expensively. Talk to your client. Consult public books, records, and documents. Use the Freedom of Information Act. Study newspapers and databases. Conduct interviews of third persons.

Another way to perform discovery rapidly and economically is by agreement with counsel, instead of through formal

procedures. An agreement to exchange critical documents will get them without the expense and delay of a formal request for production. A stipulation may bring a distant witness to you, thus avoiding the cost and delay of lawyers traveling to the witness.

Formal discovery may ultimately be inevitable, but it is expensive. Going into it without a realistic, client-approved budget can be a big mistake. Without such a budget, you may well exceed your client's unstated cost expectations in the middle of a hard-fought discovery campaign. You then have to go back to explain why more must be spent. Worse, if your client balks, you may have to go forward inadequately prepared. Either way, you will have an unhappy client.

To prepare a realistic budget, you must formulate a discovery plan that covers both your discovery and your opponent's. The heart of the discovery plan is understanding the case. Do not start discovery until you have marshaled the facts and analyzed the issues. Have a preliminary idea of the fronts on which you will fight; there is little use conducting discovery on matters that will probably not be contested.

You cannot always foresee all future developments, but it is a mistake not to try. That way your client will be able to make an informed decision about how much he wants to invest in the case. This is important. There is always something more that could be done. You and your client can avoid future disappointments if you talk at the outset about how much discovery you can do; and then about how much you will do.

Planning discovery means thinking not only about what you want, but also about how to get it. A common mistake is to think of discovery devices as interchangeable. Each serves a distinct purpose. Each has distinct advantages and disadvantages. To account for this, discovery planning must be done in specific terms. You must decide what witnesses need to be deposed, for what purpose, and in what sequence. You will have to determine what documents you must inspect before the depositions and what documents you will probably have to produce. In addition, you will have to think about the preliminary information you need to get through interrogatories, and how to coordinate the sequence of your discovery with your opponent's. Devising such a plan requires a

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*Judge Schwarzer is the author, with Lynn Pasahow, of Civil Discovery: A Guide to Efficient Practice (Prentice-Hall Law & Business, 1988). All references are to the Federal Rules of Civil Procedure.*

period of detailed, careful thought before you fire the first discovery salvo.

Such planning must be based on an informed strategy. A common error is to proceed without evaluating your options: Should you, for example, try to impress your opponent quickly in the hope of inducing an early settlement? Or should you try to keep him in the dark as much as possible to preserve surprise at trial? Are there intermediate options?

Just as each discovery device has its particular purposes, each provides different opportunities for mistakes. Take depositions, for example. Whether or not there is a trial, depositions are almost always key features of any litigation. They can provide vital information, influence settlement valuation, and determine the course of trial testimony. How depositions are conducted is therefore crucial. It presents infinite opportunities for error.

The first such opportunity is the decision whether to take a deposition at all. Do not depose anyone unless you have a clear purpose. Think twice about taking the deposition of an adverse witness if it is not needed to commit him to his trial testimony or to learn what he knows. It is a mistake to depose a witness when the likely result will simply be to preserve unhelpful testimony.

Knowing your purpose involves more than just avoiding stark deposition disasters. Unless you are clear about what you are doing, you will not even be able to frame your questions appropriately. If you want to commit an unfavorable witness to his position, your questions must be thorough and complete without giving him undue opportunity to enlarge and embellish. A witness you expect to be helpful, on the other hand, can be given more freedom to provide the desired information, but be sure to frame questions so that the responses will be admissible at trial.

Unnecessary or unfocused depositions are common mistakes, and so are abusive tactics. Abuse includes the questioner's harassment of witnesses and the opponent's obstruction of testimony. It all results in an unnecessarily long and burdensome deposition, and a poor record. Of course, those results are, unfortunately, often just what the abusive lawyer wants.

## Abusive Depositions

Lawyers sometimes adopt abusive tactics in the hope of exhausting and discouraging an opponent or perhaps in self-defense against the abuse raining down on them. Whatever the reason, using abusive tactics is a mistake. Even if it occasionally produces short-term results, it is unprofessional and may be unethical. In the long run, lawyers who pursue such tactics will sacrifice their professional reputations; they will be detested by other lawyers and distrusted by the courts.

Even in the short-term, guerrilla warfare at a deposition entails substantial risks. In the past, judges may have been reluctant to sort out discovery quarrels and fix responsibility. They now are losing patience. The threshold of judicial tolerance is dropping. Substantial discovery sanctions, sometimes running to several hundred thousand dollars, are being imposed. Lawyers who pursue abusive tactics can also expect a wide range of nonmoney sanctions. The judge may order a deposition terminated, a witness precluded from testifying at trial, or certain facts deemed established for purposes of the trial. See Rules 30(d) and 37(b)(2).

Just as it is a mistake to use abusive tactics, it is also a

mistake to tolerate them. But a lawyer should not counter abuse with abuse. Instead, he should warn opposing counsel clearly and succinctly that abuse will not be tolerated. If it continues, the lawyer should promptly take the matter up with a judge or magistrate.

Many antics that seem abusive are less products of deliberate purpose than of inexperience, incompetence, or lack of preparation. Inept questioning, for example, can lead to heated objections and arguments. Consider this: In a recent personal injury case against a railroad, plaintiff's counsel asked a railroad employee this question:

As roadmaster, are you the one within your territory that's responsible for making sure that the employees working under you have a safe place to work?

The question seemed innocuous. But cautious defense counsel understandably objected because answering the question might have called for legal conclusions. The objection led to an argument. The meanings of "safe place to work" and "responsible" were debated. It went on and on. All told, the attempt to get an answer to a basically simple question consumed 11 pages of transcript.

The railroad question illustrates a common mistake: asking unnecessarily long questions with hidden complications. Why not start by asking the witness to state what duties he performs in connection with employee safety? Then, through brief and specific questions, pursue the openings his answer presents. The witness's factual description of his job duties will surely be more useful than a confused answer to a complicated question.

One reason lawyers do not ask simple, straightforward questions is insufficient preparation. Attorneys try to make up for lack of preparation by asking convoluted questions that seek to cover all the bases. Because they lack the focus that advance work brings, they try to cover everything at once. The result is almost useless answers.

Sometimes, however, cumbersome, inept questions turn out to be traps. By slipping in an unwarranted premise or assumption that the witness might miss, a damaging answer or inadvertent admission may be elicited. Suppose, for example, the witness is asked: "After X left, did you then call Y?" The witness may well focus on the second part of the question—whether he made a call. What he may miss is the premise in the question's first part that X had been with the witness; this may or may not be true. Unless the evidence supports the premise, to resort to such questions is a mistake because it compels opposing counsel to object to protect the witness. The result is a contentious, and unnecessarily long, deposition.

But fault lies not only with the interrogating lawyer. Lengthy objections and persistent bickering are as abusive as poorly phrased questions. There is no excuse for such tactics—they would not be tolerated in court, and there is no reason to tolerate them in the deposition. Rule 30(c) contemplates that testimony is to be taken subject to objection; the ground of an objection should be stated briefly and the deposition should proceed. Instructions not to answer, with rare exceptions, are proper only to protect privileges. And objections should never be used to coach a witness or suggest the answer. Speaking objections—for example, "answer only if you know"—are rarely proper.

The harm that flows from such mistakes was graphically

illustrated in the deposition described earlier from the railroad personal injury case. That examination, which should have been completed in an hour, consumed 191 pages, 31 of them devoted to the making of 133 objections. Unfortunately, this is not unusual.

Sometimes, of course, deposition abuse is intentional with a vengeance. It is the product of deliberate purpose, reflecting the hard ball or bare knuckle approach to litigation. Here is an excerpt from a deposition in a major lawsuit. It was conducted by leading trial lawyers from two prominent law firms.

Mr. X: No tricky questions.

Mr. Y: There is no trick here.

Mr. X: Counsel, I pay acute attention to everything you do, for the purpose of catching the little tricks like that . . .

Mr. Y: Are you going to withdraw your statement that it is a trick?

Mr. X: Do you want to withdraw the question? . . . Otherwise, leave it all in.

Mr. Y: We will leave it all in. It is an insult.

Mr. X: You have very thin skin. You ought to get over that if you are going to be a trial lawyer.

Mr. Y: [Addressing X]

Mr. X: You get insulted too easy.

Mr. Y: I don't think so.

Mr. X: You have too many problems of that sort.

...

Mr. Y: I want to finish this deposition now. . . . Are you prepared to keep Mr. \_\_\_\_\_ past four o'clock today?

Mr. X: I want you to call the judge, and talk to the judge, Sonny.

Mr. Y: What did you call me?

Mr. X: Sonny. That's what you are acting like.

Mr. Y: You are the most boorish adult—

Mr. X: Call him.

Mr. Y:—that I think I have met in a long time.

Mr. X: Are you going to call him or am I?

Mr. Y: I am going to call him.

Mr. X: Do it.

Mr. Y: Before I do . . .

Mr. X: Jesus Christ.

...

Mr. Y: Mr. \_\_\_\_\_.

Mr. X: After two days, can you remember the witness's name, counsel? Normally, when I fail to call someone by his right name, I apologize. Don't you?

Mr. Y: Mr. \_\_\_\_\_ knows that it was an unintentional error.

Mr. X: All I'm asking is common courtesy.

Mr. Y: I am prepared to extend as much courtesy as I can, more so than you, who seems to want to use words like "Sonny," "horseshit," etc.

Mr. X: Let me tell you something, counsel. One more time, I warn you, one more time of that kind of uncalled-for, unjustified conduct on your part, and we will terminate the deposition, and you will go and explain to the judge why you should say things like that.

It is difficult to understand how competent lawyers could permit themselves to act in this fashion. But it is surely a mistake. It is a mistake for the lawyer who starts it and for the

lawyer who permits it to continue. It wastes time and money and usually results in a largely useless transcript. It may temporarily frustrate an opponent, but sooner or later it will lead to sanctions that may prejudice the client's case. Even apart from sanctions, it will diminish the professional standing of the participants in the eyes of anyone who happens to read the record.

Depositions provide the most colorful and alarming examples of discovery fumbles, but not the only ones. Think about interrogatories. Carefully drafted and precisely aimed, they can be useful discovery devices. But to use interrogatories as a vacuum cleaner, sweeping across the entire case to pick up everything, is a mistake. Most lawyers are well schooled in answering such omnibus interrogatories without saying anything. The interrogating lawyer should therefore limit herself to questions that cannot be evaded.

This means that interrogatories are useful mainly to obtain discrete, objective data: names, dates, places, calculations and computations; the identity of files, records and documents; and similar matters. Correspondingly, it is a mistake to serve interrogatories that call for narrative answers, opinions or conclusions (except from experts), or that attempt to cross-examine or impeach an opponent.

Contention interrogatories are appropriate so long as they do not become contentious. See Rule 33(b). It is acceptable to ask, for example, whether the opponent contends that the claims are barred by laches, that the plaintiff was contributorily negligent, or that an article infringes a patent. It is a mistake, however, to inquire into evidentiary minutiae. In particular, it is useless to ask the opponent for each fact or document on which each allegation of the complaint is based. This is burdensome and likely to produce a discovery dispute instead of information.

Even when interrogatories deal with a proper subject, lawyers often make the mistake of drafting them in argumentative or conclusory terms. For example, where the issue is



whether the opponent received notice—a mixed question of law and fact—do not ask “when did you receive notice?” To avoid a dispute, the interrogatory should seek only an objective, factual response: “Did you receive a letter from A to B?” The appropriate legal conclusion can then be argued on the basis of the facts stated in the response.

Mistakes are equally common in interrogatory responses. Many pro forma objections are meritless and lead only to unnecessary disputes. Such reflexive objections include claims that the opponent already has the information; that it is available from other sources; that it is burdensome to provide; or that it is privileged or work product. The first two hardly ever have any merit, and the last two are valid much less often than they are raised. Only carefully thought out and well-supported objections should be raised. If there is no legitimate objection, simply answer the interrogatories fairly and fully.

Motions to compel answers to interrogatories (and other discovery) provide many opportunities to err. The burden is on the interrogating party to compel answers through a motion. Rule 37(a)(2). Making such a motion over a minor

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## **Paradoxically, it is a mistake to treat requests for admission as discovery devices.**

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failure to respond may waste time and money. But, if the failure is substantial, move quickly. If the motion is not promptly made, the judge may hold that the ground on which the motion could have been made has been waived. This is particularly true if the passage of time has made it more difficult or costly for the opponent to respond. Keep in mind also that compelling a response may subject the moving party to a reciprocal obligation. If you wish to protect some category of your own information, do not compel your opponent to provide the same to you.

What about requests for admission? They are not often used, perhaps because they intimidate some lawyers. They are usually *misused* by converting them into a vehicle for argument. Sometimes they amount to little more than this: “Admit or deny that there is absolutely no basis for Count I of your complaint.”

Outrage at your opponent’s seemingly preposterous assertions, however, is not a sufficient basis for requests. They should be directed only at material evidence or ultimate facts that the propounding party reasonably believes cannot be disputed. It is therefore a mistake to expect your opponent to admit a legal conclusion, unless it is obviously indisputable. If you have an agency issue, for example, the proper use of requests would be to secure admission of indisputable matters such as the terms of employment and the scope of duties. This will get you much farther than asking, “Admit that Mr. X was your agent.”

Paradoxically, it is a mistake to treat requests for admission as discovery devices. They are really case-management devices. Using them, the parties can narrow factual and legal issues. Each side also can force the other to think hard,

perhaps for the first time, about its case. Given this, it is a mistake to swamp the opponent with vast numbers of requests directed at evidentiary details. This will serve no useful purpose and will ordinarily lead your opponent to return the favor and swamp you back.

Document production may well be the litigator’s lifeblood. Under the federal rules, it yields vast streams of revenue for law firms, with relatively little opportunity to get into trouble.

But the very ease of the process is insidious. It leads to one of the greatest mistakes regularly committed: asking for more than you need and more than you can handle. Experienced litigators estimate that they rarely use more than 5 percent of the documents produced. They also know that it can cost \$5 to \$10 *per document* to handle a production: searching, reading, indexing, computerizing, and analyzing cost money for every piece of paper. Approaching document discovery without realistic goals and a budget is therefore a mistake. Litigation generally has an economic purpose. That purpose may be better served by a document search designed not to locate every last potentially relevant document, but only those most likely to be helpful. Here, as in many other areas, the best can be the enemy of the good.

Sound document discovery requires careful thought. If only certain shipments are relevant, do not ask for all shipping documents. If only a particular product is involved, do not ask for complaint letters covering all products. Remember that asking for too much may cost your client more than money. You may just miss the really important material if it is part of a flood of documents you summon down on yourself.

If one side can seek too much, the other may produce too little. Failure to produce damaging documents when the other side asks for them is the most serious mistake a responding party can make. Document discovery is an anomaly in the adversary system; it can require voluntary production of harmful information. It is difficult for lawyers to bring themselves to turn over the smoking gun without a struggle. For some clients, it is unthinkable. There is a great temptation, if not to destroy an offending document, at least to misplace it or bury it someplace where it may be overlooked.

Everyone knows this is a mistake—and worse—but that is not always enough to deter it. It is a mistake not just because it is morally wrong. It is also a blunder because suppressed documents have a way of turning up from other sources later in the case with devastating effects both on lawyer and client.

A failure to produce may also result from indifference: a negligent failure to conduct an adequate search or loyal employees’ well-intended failure to look in places where damaging materials might be found. The rules require a thorough, good-faith search. Do not accept anything less. See Rule 26(g). This can best be accomplished by giving the client explicit written instructions and insisting on a written compliance report.

The opposite blunder is the inadvertent production of more than was intended. When large volumes of documents are produced, they may contain privileged material that should have been extracted. It is a mistake to produce documents without first making a thorough inspection for privileged matters and, to be doubly safe, entering into a  
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# Discovery Mistakes

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stipulation that inadvertent production of privileged matter shall not be taken as a waiver.

Discovery of experts can be a trackless bog for many lawyers. The federal rules establish a finely tuned regime for expert discovery. See Rule 26(b)(4). Counsel ignore it at their peril. A key feature of that regime is that generally only experts expected to testify at trial are subject to discovery. Your client can consult an expert without having to respond to discovery about it. But it is a two-way street. If you do not make an expert available for discovery, do not expect to put him on the stand at trial. Lawyers too often overlook the important differences, for discovery purposes, between consulting experts and trial experts.

Serious errors occur in discovery against experts. The first is giving your expert materials you have prepared as a lawyer in connection with litigation. They would normally be immune from production as trial preparation material under Rule 26(b)(3). But if you give them to the expert to prepare for discovery, they may have to be produced. In general, all materials underlying an expert's opinion are discoverable. You must therefore approach expert preparation with care.

The other common mistake in expert discovery is excess zeal. Overwhelmed by the expertise they have newly acquired for their case, lawyers try to take on the opponent's expert to demonstrate the error of her ways. Few succeed. Mostly, they prepare the opposing expert for cross-examination at trial. An expert's deposition can be a useful dry run for testimony in court, enabling her to plug the holes and sharpen the edges. Since there will rarely be factual contradiction, the deposition will usually have little impeachment value.

A sophisticated lawyer will see the expert's deposition more as a time for setting the trap than for springing it. You want to tie the expert firmly to opinions and bases for them. Above all, you want the expert irrevocably com-

mitted to all the assumptions on which the opinion is based, leaving no room for new ones at trial. You are then free at trial to demonstrate the lack of foundation for any crucial assumptions or other error.

A final major discovery mistake is fighting too much about discovery. Discovery disputes can make otherwise useful discovery counterproductive. It can cost so much to litigate objections to interrogatories or to enforce document requests that whoever wins gains only a Pyrrhic victory. Of course, in handling discovery disputes, lawyers are somewhat dependent on the court's procedures. But whatever approach the court uses, it is a mistake for lawyers not to attempt first to agree on a procedure for the rapid, efficient resolution of discovery disputes. This can then be urged on the judge or magistrate. Such expedited procedures may rely on telephone conference calls, presentation of the dispute by letter, or filing of memorandums limited to five or ten pages. In this way, lawyers can avoid the mistake of burying themselves in satellite litigation.

The most pervasive discovery mistake lawyers make is to forget the purpose of discovery. The framers of the federal rules intended that discovery would give each party rapid and low-cost access to the truth. The hope was that, as a result, cases would be settled or tried speedily and inexpensively. The rules have just turned 50 years old: It is a good time for lawyers to remind themselves of what discovery is supposed to be all about. □

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## Trial Notebook

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of omission are punishable under the act, you think an indictment is unlikely. Very well, we will let the preparation session continue.

After he heard about his right to remain silent, Bixby said he wondered what the other sales managers were going to say to the grand jury. At that point, the young lawyer said he had talked with the lawyers for the other two companies, and they said the other sales managers both insisted that noth-

ing improper had taken place at the meeting.

But that was not strictly true. Instead, both of the other lawyers had said they were worried about what their sales managers would tell the grand jury. On the other hand, they both thought that while the conversation at the sales meeting seemed suspicious, it was not actually a violation of the law.

Now in addition to the omissions, you also have some active misrepresentation—even though it may have been wishful thinking. Does it qualify as “misleading conduct”? Put it another way: Is there any reason why it is *not* “misleading conduct”? Did the young lawyer knowingly make a false statement or intentionally omit information from a statement and thereby create a false impression? Go ahead and read the statute again if you think it will help.

Of course it is not all bad that some lawyers are being punished for the way they prepare witnesses to testify. As Douglas D. Connah, of Baltimore, Maryland, said, “It’s about time.” Connah’s point is well taken. For years, lax enforcement of ethical standards and criminal rules have let lawyers who have been willing to cut ethical corners in the witness preparation room make things tough for the rest of us.

Nevertheless, you may feel that the *Victim and Witness Protection Act* casts too broad a net. Every witness preparation is done with the intention of influencing the witness’s testimony. That is the point of witness preparation, but it does not make it wrong.

Without question, “influencing” the testimony of witnesses is one of a trial lawyer’s most difficult and delicate jobs. Properly done, it aids the administration of justice. Improperly done, it is literally an obstruction of justice. Doing it properly requires careful thought, genuine finesse, and close attention to the highest standards of professional conduct.

So the question is not just whether the young lawyer stepped over the bounds, but also whether the *Victim and Witness Protection Act* might punish proper conduct.

If so, what protection does it contemplate for ethical lawyers who are doing the right sort of witness influencing?

First, the defendant is permitted to prove by a preponderance of the evidence that his conduct was lawful and that his *sole intention* was to encourage